# JURISDICTION TO ANNUL A MARRIAGE

THE law has gone a long way from the theory that a valid matrimonial union is indissoluble. Whatever the church may say about remarriage of a party once married and divorced, the civil authority has no difficulty in saying that marriage bonds may be completely severed. It is now clear that power to dissolve a marriage relation by divorce belongs to the law where the parties are domiciled, and is based on the jurisdiction of a state to deal with the status of its citizens.[1]

Is the situation different when the relation of the parties is ended by a decree that the marriage was null and void, as distinguished from a divorce decree which dissolves it? In other words, does jurisdiction to annul a marriage differ from that of divorce? It is, of course, granted that any state if it pleases may treat two people as unmarried while within its borders. It may give a man a divorce whether he is domiciled there or not. Such procedure has been a national scandal. But his decree will not keep him out of trouble if he marries again in another state. In the same way a court could grant an annulment of marriage to any party before it, which, if in accordance with the local law, would entitle the party to the privileges and immunities of a single person within its borders. But this is not jurisdiction in what may be termed the international sense, in the sense in which the word is used in Conflict of Laws, a jurisdiction which will entitle the decree to recognition elsewhere. Does jurisdiction in this sense depend on domicile as does that for divorce? Eminent authority has so declared. Says Bishop:[2]

"A suit to declare a marriage void from the beginning concerns the marriage status precisely like one to break the marriage bond for a post-nuptial *delictum*. Therefore it may be and should be carried on in the courts of the domicile."

That a suit for annulment concerns the marriage status there is no doubt, that it concerns this relation precisely like one to break off the tie for a postnuptial *delictum* is not so clear. The effect of

[1] MINOR, CONFLICT OF LAWS, § 88.

[2] 2 BISHOP ON MARRIAGE, DIVORCE AND SEPARATION, § 73.

a divorce decree and one of nullity are certainly different. It is true that after a divorce decree the parties become strangers in the eyes of the law. Each may sue the other as though no marriage had existed;[3] the relationship by affinity is terminated;[4] the parties are no longer disqualified from testifying in a suit in which the other is concerned on the ground of interest;[5] the wife may be a competent witness in a criminal case against the former husband as to matters arising after the divorce.[6] But there is real significance in the statement that the relation is destroyed "as if by death."[7] It once had a lawful existence, of which the legal consequences continue even though the relation itself has terminated. Offspring born or conceived during the wedlock are legitimate;[8] personal choses of the wife, already reduced to possession by the husband remain his.[9] Communications between the parties made during the time of wedlock come within the rule excluding the admission in evidence of confidential communications between the husband and wife.[10]

An annulment cuts deeper. The woman, after such a decree, can sue a seducer notwithstanding a form of marriage between them, which if valid would have defeated the action.[11] Communications made between the parties after the marriage and prior to the decree are not treated as confidential communications between husband and wife, and there is no prohibition upon their admissibility in evidence.[12] The husband acquires no rights in the wife's property.[13] The woman may maintain an action against the man for the wrongful cohabitation.[14] She is not entitled to the homestead exemption given a divorced wife.[15] Unless a statute protects them, the children of the parties are illegitimate.[16] The divorce de-

[3] Carlton *v.* Carlton, 72 Me. 115 (1881).
[4] Kelly *v.* Neely, 12 Ark. 657 (1852).
[5] State *v.* Jolly, 3 Dev. & B. (N. C.) 110 (1838).
[6] Long *v.* State, 86 Ala. 36, 5 So. 443 (1888).
[7] 9 R. C. L. 486.
[8] Wait *v.* Wait, 4 N. Y. 95 (1850).
[9] Lawson *v.* Shotwell, 27 Miss. 630 (1854).
[10] Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820 (1896).
[11] Henneger *v.* Lomas, 145 Ind. 287, 44 N. E. 462 (1896).
[12] Wells *v.* Fletcher, 5 Car. & P. 12 (1831).
[13] Aughtie *v.* Aughtie, 1 Phillimore Ecc. 201 (1810).
[14] Blossom *v.* Barrett, 37 N. Y. 434 (1868).
[15] Floyd County *v.* Wolfe, 138 Iowa, 749, 117 N. W. 32 (1907).
[16] 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, § 277; 2 *Ibid.* § 1602. See 3 CORNELL L. QUART. 51, for collection of New York cases under the provisions of the

cree, in short, cuts off and destroys the ill-favored marriage plant, annulment tears it up by the roots.

Through a great deal of the authority on this subject of annulment of marriage, there is nevertheless a failure to distinguish nullity and divorce suits. One judge has called an attempt to differentiate them a mere juggling with terms.[17] That courts should often use the terms interchangeably and apply statutes provided in divorce cases to suits for annulment is not surprising; nor is it to be wondered at that legislatures assume a common ground of jurisdiction for both. The common use of the terms is of long standing. Back in the time of Coke that venerable jurist, in commenting on a statement of Littleton's concerning the effect of a divorce in the law of estates, explains that there are two kinds of divorce:[18]

"One *à vinculo matrimonii*, and the other *à mensâ et thoro*. . . . Divorces *à vinculo matrimonii* are these; *Causâ praecontractûs, causâ metûs, causâ impotentiae seu frigiditatis, causâ affinitatis, causà consanguinitatis*. . . . *A mensâ et thoro*, as *causà adulterii*, which dissolveth not the marriage *à vinculo matrimonii*, for it is subsequent to the marriage."

Blackstone[19] also, instead of contrasting divorce and annulment, speaks of two kinds of divorce, and points out that a total divorce must be for some of the canonical causes or impediments existing before marriage. "For in cause of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*, and the parties are therefore separated *pro salute animarum*." The issue of the marriage thus entirely dissolved are bastards.

Divorce in ecclesiastical law, and in the sense in which these writers are using the term, meant two things: first, divorce *a mensa*, or modern judicial separation, after which, as Coke says, "the coverture continueth;" second, annulment, which then as now was declared

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New York Domestic Relations law which seems to make nullity decrees in some cases speak from the time they are pronounced only.

[17] Mitchell *v.* Mitchell, 63 Misc. 580, 117 N. Y. Supp. 671 (1909). "A mere difference in form" it was called in Turner *v.* Thompson, 13 P. D. 37 (1888). Perhaps it was in the particular case, where a woman who had previously secured a divorce in the United States on the ground of her husband's incompetency, was seeking an annulment of the marriage, which had taken place in England. Being already free, she was in no need of a further decree.

[18] COKE ON LITTLETON, 235 *a*.

[19] 1 COMMENTARIES, 440 *et seq*.

for causes existing prior to the marriage. All matters pertaining to the marriage relation were adjudicated in the ecclesiastical courts, and the doctrine of the church was firm against the possibility of dissolving a valid marriage. The theory was preserved by giving wide scope to the doctrines by which a marriage could be avoided. While it accomplished for the party the same practical results as a modern divorce, freedom from a burdensome matrimonial yoke, and was perhaps easier to get, the theory was entirely different. A marriage, said the church court, had never existed.[20] Though in exceptional cases, beginning with the seventeenth century, marriages were dissolved by Act of Parliament, it was not until the Matrimonial Causes Act that an English court could decree a dissolution of a validly existing marriage.[21]

Coke and Blackstone were not confused on the difference between divorce and annulment, because divorce as we now have it in the law was unknown to them. If divorce in our day meant the same as in Coke's, perhaps we should have no need to distinguish divorce and nullity jurisdiction. Since it does not, it would be well to keep the difference clearly in mind. With characteristic felicity of statement, Mr. Justice Holmes has used, in another connection, language applicable here:[22]

"As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied."

It is clear that divorce and annulment do not affect marital relations in the same way. It is the contention here that as the results of the two differ, so jurisdiction for an action to nullify a marriage differs from that for divorce, and the difference is caused by the

[20] See the interesting discussion by J. W. Brodie-Innes, "Some Curiosities of Marriage Law," 13 ILL. L. REV. 183. See also Lord Bryce, "Marriage and Divorce," 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 782, 822 *et seq.*

[21] See Holdworth, "Ecclesiastical Courts," in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 297 *et seq.* Sir W. Page Wood, V. C., in Wilkinson *v.* Gibson, L. R. 4 Eq. Cas. 162, 166 (1867); ". . . Whenever such expressions as divorce *à vinculo* occur, they always refer to cases where there never existed a *vinculum*, and the so-called marriage was never a marriage at all." Sir William Scott in Proctor *v.* Proctor, 2 Hagg. Cons. 292, 296 (1819): "The obligations of marriage might be suspended but could not be extinguished, the parties might be released in certain cases from personal cohabitation, but the relations of husband and wife still subsisted."

[22] Guy *v.* Donald, 203 U. S. 399, 406 (1906).

fundamental distinction between the objects of the two suits. It seems worth while to analyze the situation as it appears on principle, then to ascertain how far court decisions and legislative enactments affect the result.

Suppose that parties resident in state A have married there, and have lived (that is, have been domiciled) successively in states A, B, C, and D. Now while they are domiciled in D one of them seeks to have the marriage annulled. It would be an anomalous doctrine that would permit state D to declare the relations of this pair were meretricious throughout, to go back and change the whole legal effect of their relations prior to the time they became citizens of D. The man might have married his deceased wife's sister, and the marriage might have been perfectly lawful in A, and in B and C as well. Is the effect of the D decree to proclaim the children forever bastards, to make confidential communications between these people subject to disclosure in any court, to render this man liable to an action by the woman? It is conceded, of course, that D can say, for whatever reasons that seem to it sufficient, that these parties, now domiciled within its borders, are no longer fit to live together as husband and wife, and can divorce them, free them from that time on. But how can it say that they never were married, when A, in which jurisdiction they lived when the contract took place, and which controlled their status then as fully as D does now, declared them husband and wife? Jurisdiction A would not and could not say that because a pair entered into the marriage relation as citizens therein, that another state in which they subsequently became domiciled could not put an end to the status.[23] But A has fully as much right to take this ground as D has to say the status never existed. A court having a thing before it may, by a decree *in rem*, change rights in the thing the validity of which will be recognized everywhere. But no one would contend that such a court could effectively say that rights vesting under a prior decree in a different jurisdiction where the *res* then was, had never existed. So here: the marriage relation is the *res*, and is so treated in divorce actions. The court having the domicile of the parties has jurisdic-

[23] See Harvey *v.* Farnie, L. R. 8 A. C. 43 (1882); Bater *v.* Bater, [1906] P. 209; and as recognizing an opposite doctrine, Hull *v.* Hull, 2 Strob. Eq. (S. C.) 174, 177 (1848). The court there opines that a South Carolina marriage may not be dissolved, though that of another state may.

tion *in rem*. But it cannot set aside what the former sovereign controlling the *res* has done. The Supreme Court of South Dakota seems entirely correct in holding that when first cousins were married in California, where they lived, and where such a marriage was legal, a decree of annulment could not be granted in South Dakota, where such a marriage was forbidden, even after the petitioner has made a home there.[24] Corson, J., said:

"The courts in this state are clearly without authority under the general principles applicable to the law of marriages to annul a marriage legal and valid in a state where the same was contracted, and where the parties were domiciled."

The correctness of the actual result is emphasized by the cautious reservation, in a concurring opinion by Whiting, C. J., adopted by the remainder of the court, wherein he declined to express an opinion on the criminal liability of the parties for cohabitation in South Dakota. It could well be that while the California marriage could not be annulled, South Dakota could punish cohabitation of cousins, whether married or not, if such association was abhorrent to Dakota morals.

If this position is sound, and jurisdiction to annul a marriage is not to be assumed by the law of the domicile of the parties, what law can decree it null and void? The logical answer is, that since the annulment goes back to the question of inception of the marriage status, it ought to be the law by which the status would come into being that should say that despite the form this man and woman went through they never became husband and wife.[25] It would not matter whether the parties at the time the question arises had become domiciled in another jurisdiction. The state pronouncing the decree of nullity is not seeking to affect a *res* over which it no longer has control; it is saying that no *res*, that is, marriage relationship, ever came into being. It certainly can do that, as well as it can control a judgment pronounced in one of its own courts. Further, the question should be referred back to this jurisdiction. In the matter of dissolving a marriage status, state X, where the parties are personally present, will not give a divorce decree to

[24] Garcia *v.* Garcia, 25 S. D. 645, 654, 127 N. W. 586 (1910).

[25] This view is taken in a well-written note on the point in 26 HARV. L. REV. 253. The note writer probably, and the present writer certainly, is indebted for the idea to a suggestion made by Prof. Joseph H. Beale in his course on the Conflict of Laws.

them if domiciled elsewhere, even applying the law of Y, their domicile. If they are to have a divorce they must go to Y to get it. A declaration of nullity is a more delicate matter than divorce, because of its effect on events between marriage and decree. The jurisdiction governing the marriage and no other should pronounce it annulled.

The determination of the original validity of a marriage may involve two laws, if the contracting parties are married in a state other than that of their domicile. It is said generally, especially by American authorities, that a marriage good where contracted is good everywhere.[26] And there are many extreme examples in the American cases where a marriage contracted out of the state has been declared valid, though expressly forbidden by the law of the contracting parties' domicile.[27] If the law of the state where people go through a marriage form is not complied with, the first essential to the creation of a marriage status is lacking. If the *lex loci celebrationis* demands certain forms, declares certain people unfit to marry, or makes other requirements, it has jurisdiction to declare that the failure of parties to comply with what it deems essential prevented them from becoming husband and wife, and to declare their attempt null and void.

But the place where a man and woman happen casually to be at the time of a marriage ceremony cannot have a final determination of this matter of marriage. The marriage status both in its creation and destruction is of great importance not only to the individual, but also to the state where he makes his home.[28] With the insistence of the law upon vigorous adherence to the right of domicile in ending the status, is it to be ignored entirely in the equal important creation? It is believed that the beginning of the marital relation is really a matter for the domiciliary law. But following a

[26] MINOR, CONFLICT OF LAWS, § 77; STORY, CONFLICT OF LAWS, § 113.

[27] Dudley *v.* Dudley, 151 Iowa, 142, 130 N. W. 785 (1911); Commonwealth *v.* Lane, 113 Mass. 458 (1873); Medway *v.* Needham, 16 Mass. 157 (1819); Stevenson *v.* Gray, 17 B. Mon. (Ky.) 193 (1856); *In re* Wood's Estate, 137 Cal. 129, 69 Pac. 900 (1902); State *v.* Shattuck, 69 Vt. 403, 38 Atl. 81 (1897); *Ex parte* Chace, 26 R. I. 351, 58 Atl. 978 (1904).

[28] That marriage relations are of consequence to the state has not always been the rule. In his interesting discussion on Marriage and Divorce, Lord Bryce shows how under the Roman law the entering and the leaving of the marriage relation was treated as the sole business of the parties themselves. 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 782.

general policy of encouraging marriage, and for reasons of convenience, the law of the domicile says, usually, if the parties' marriage is valid where contracted, that is sufficient to establish the marriage status.[29] Devolution of personal property is according to the law of the domicile of the deceased at the time of his death, but only because the law of the situs of the property permits it so to go.[30] The state of the situs can tax the passing by inheritance;[31] it can, and sometimes does, change the rule so that its own statute of distributions governs the succession.[32] So in marriage the sovereign of the marrying party's domicile may refuse to make him a married man despite a valid ceremony elsewhere. English courts say an Englishman will not be married by a ceremony of marriage valid where entered into, unless he has capacity to marry by English law.[33] They hold that where the marriage is of a kind abhorrent to their ideas of morality and forbidden by English law, no marriage relation is created by a foreign marriage of an Englishman, though valid where celebrated.[34] Southern states have said that a ceremony of marriage of one of their citizens with a member of another race forbidden by their laws created no relation of wedlock,[35] even if celebrated in another state where permitted. Statutes frequently declare invalid marriages contracted abroad by the citizens with intent to evade the marriage laws of their domicile.[36] And in the case of persons married where there is no law, or no law of nuptial contracts, how can following the form of the law of domicile be effective to make them husband and wife, as text-writers often say,[37]

[29] See a note on "Validity of Foreign Marriages," 26 HARV. L. REV. 536, containing about the same idea as that expressed here.

[30] See Prof. Charles E. Carpenter in 31 HARV. L. REV. 905, 920, 921.

[31] Matter of Swift, 137 N. Y. 77, 32 N. E. 1096 (1893). For a statute, so doing, IOWA CODE SUPP. § 1481 *a*.

[32] HURD'S REV. STATS. OF ILLINOIS, 1917, c. 39, § 1.

[33] See the valuable discussion of the English cases in an article, "Capacity and Form of Marriage in the Conflict of Laws," by Thomas Baty, 26 YALE L. J. 444.

[34] Brook *v.* Brook, 9 H. L. C. 193 (1861).

[35] State *v.* Kennedy, 76 N. C. 251 (1877); Kinney *v.* Commonwealth, 30 Gratt. (Va.) 858 (1878); State *v.* Tutty, 41 Fed. 753 (1890).

[36] D. C. CODE, § 1287 (1902); BURNS ANN., IND. STAT., Revision of 1908, § 8367; REV. STAT. MAINE, 1916, c. 64, § 10; MASS. REV. LAWS, c. 151, § 10.

[37] MINOR, *supra*, § 77. The opinion of Huber, who is declared by Professor Lorenzen to have had "a greater influence upon the development of Conflict of Laws in England and the United States than any other work," is interesting in this connection even though perhaps not of great importance. He says (translation by Professor Lorenzen): "It often happens that young people under guardianship, desiring to unite their secret

if it is not the law of that domicile after all, which is the real creator of the marital relation?

There are numerous cases in this country where, in various situations, the court at a person's domicile has refused to recognize a marriage contracted outside his own state, in evasion of its laws, where the legislature has expressly, or in the opinion of the court, impliedly, announced the state's policy against such union.[38] Such results are from one standpoint unfortunate, for they render uncertain the marriage relation. But the adoption of the policy of refusing to recognize the marriage is a matter for each state to determine for its own citizens,[39] and uniformity of ideas on this subject seems a long way off.

To recapitulate: since annulment of a marriage differs so fundamentally from divorce, in that while the latter severs the matrimonial bonds, the former declares they never existed, jurisdiction to render the nullity decree is not to be found where the parties at the time it is sought may be domiciled. Only the law by which the marriage came into being has power to annul it. If the place of contract, domicile at the time of the marriage and domicile at the time of annulment, are the same, no difficulty is presented. If the place of contract is another state, its law can say that the parties involved did not validly contract, and there is then nothing on which a marital status can be predicated. Despite a valid ceremony by *lex loci contractus*, the then domiciliary law may say that no marriage status is created. But if the marriage can successfully run this gauntlet, it stands until dissolved by death or divorce.

If there is jurisdiction over the subject matter as worked out in the above discussion, it would seem that the proceedings would be

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desires through the bonds of matrimony, go to Eastern Frisia or to some other place where the consent of their guardian is not necessary to marriage. . . . They celebrate their marriage there and presently return home. I consider this a manifest evasion of our law. Our magistrates are not bound therefore by the law of nations to recognize and give effect to marriages of this kind." 13 ILL. L. REV. 375, 410, 411.

[38] Pennegar *v.* State, 87 Tenn. 244, 10 S. W. 305 (1889). See cases cited in 26 HARV. L. REV. 536.

[39] WHARTON ON THE CONFLICT OF LAWS, 3 ed., § 165 *b*. "Each State or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative as indicative of the decided policy of the State concerning the morals and good order of society to that degree which will render it proper to disregard the *jus gentium* of 'valid where solemnized valid everywhere.'" Pennegar *v.* State, 87 Tenn. 244, 249, 10 S. W. 305 (1889).

as in any other action *in rem*, service on the respondent being necessary only for due process. The *res* would be the question of the marriage status, *maritatus vel non*. When the validity of a will is established by a court having jurisdiction, its determination is conclusive.[40] So here the existence or nonexistence of the marriage relation would be settled. Condemnation of goods in a revenue case, a grant of probate, and a decree in a matrimonial suit are all said to be judgments *in rem*, though the proceedings in form are *in personam*.[41]

When the authorities are examined, the conclusion is that the basis of jurisdiction has not been clearly enough marked out to establish any definite rule. Statements may be found to the effect that in annulment, as in divorce, jurisdiction depends on domicile.[42] These statements are practically all based on the same small group of cited cases, which will be examined in more detail.

English authorities state that the English courts have jurisdiction to declare a marriage a nullity in two situations: first, when the marriage was celebrated in England; second, where the respondent is resident in England at the date of the petition. The various text-writers state the rule in almost identical language and cite the same authorities in its support.[43] That the state where the marriage was celebrated has authority to declare it a nullity was the view contended for above. It is supported by the text-writers just cited and several English decisions squarely on the point. In *Linke* v. *Van Aerde*[44] the parties were not citizens, nor was either domiciled there when suit was brought, yet the court was clear it had jurisdiction. To the same effect are *Simonin* v. *Mallac*,[45] where both parties were French, and *Sottomayor* v. *De Barros*,[46] where they were

[40] Whicker *v.* Hume, 7 H. L. C. 124 (1858); Thomas *v.* Morrisett, 76 Ga. 384 (1886); WHARTON ON THE CONFLICT OF LAWS, 3 ed., §§ 595, 644.

[41] 1 HALSBURY'S LAWS OF ENGLAND, 48, citing for probate proceeding Noell *v.* Wells, 1 Lev. 235 (1667); for matrimonial decree, Dacosta *v.* Villa Real, 2 Str. 961 (1734), and Bater *v.* Bater, [1906] P. 209.

[42] BISHOP, *supra*, note 2; KEEZER ON MARRIAGE AND DIVORCE, § 56; 19 AM. AND ENG. ENCYC. LAW, 2 ed., 1219; 26 CYC. 908.

[43] DICEY ON THE CONFLICT OF LAWS, 2 ed., 268; WESTLAKE'S PRIVATE INT. LAW, 5 ed., § 49; FOOTE'S PRIVATE INT. JURISPRUDENCE, 4 ed., 123; 6 HALSBURY'S LAWS OF ENGLAND, 265.

[44] 10 T. L. R. 426 (1894).

[45] 2 Sw. & Tr. 67 (1860).

[46] 3 P. D. 1 (1877).

Portuguese, but where in each case the marriage occurred in England.[47]

To say that the residence of the defendant gives jurisdiction for annulment is opposed to the reasoning above and seems hard to explain. Dicey takes the statement from Westlake. In the cases which Westlake cites,[48] the judges are trying to establish that residence as something less than domicile is sufficient to found the suit. In *Roberts* v. *Brennan* a decree of nullity was pronounced when the marriage had taken place in the Isle of Man, and respondent was domiciled, and served in Ireland. This case (which was undefended) does not seem to carry out the part of the rule requiring residence of the respondent, nor was the petitioner resident in England so far as the facts reported show. It will be remembered that the English Matrimonial Causes Act[49] vested in the royal courts all jurisdiction then vested in the ecclesiastical courts in respect to suits of nullity and other matters matrimonial. As pointed out by James, L. J., in the Niboyet case, the jurisdiction of the courts Christian was one over persons who by baptism became members of the church. Residence in the diocese, as distinguished from mere temporary presence was required to make one amenable to the orders of the spiritual authorities there, but nationality and domicile were not concerned. Furthermore, the diocese and the state were not necessarily coterminous. The Channel Islands, which are no part of England, the learned judge observes, are in the diocese of Winchester, and the Isle of Man is in the province of York; and many similar cases might be found on the Continent.

Jurisdiction for divorce in England is based on domicile.[50] This was not expressly required by the statute giving the court power to decree divorce, but with no precedents in ecclesiastical law to affect the question, the matter was decided on general principles. In the question of annulment, as in case of judicial separation,[51] ecclesiastical rules obtrude. Requirement of residence of a defendant might conceivably be treated as an additional municipal require-

[47] *Accord* Brett, L. J., in Niboyet *v.* Niboyet, 4 P. D. 1, 18 (1878), and Sproule *v.* Hopkins, [1903] 2 Ir. 133. See also Bater *v.* Bater, [1906] P. 209, 220.

[48] Niboyet *v.* Niboyet, 4 P. D. 1, 9 (1878); Roberts *v.* Brennan, [1902] P. 143.

[49] 20 & 21 VICT. c. 85, § 6.

[50] Le Mesurier *v.* Le Mesurier, [1895] A. C. 517.

[51] See Armytage *v.* Armytage, [1898] P. 178.

ment to what would be required for jurisdiction on general principles of law. An analogy for this could be found in divorce law. Residence for a given period of one, two, or three years is a frequent statutory provision. This, by the prevailing view, is interpreted as an addition to the common-law requirement of domicile.[52]

Presence of the respondent within the limits of the jurisdiction or his appearance in court seemed to be necessary in order for the ecclesiastical court to proceed.[53] This rule apparently has an historical foundation.[54] It is not a question of jurisdiction in the wider sense, but of the competency of this particular court.

Since the English authorities insist strongly that the capacity of an Englishman to marry is governed by English law, it would be expected that English courts would assert their power to determine annulment suits brought by persons domiciled there when the questioned marriage took place elsewhere. There is such authority both in England [55] and Ireland.[56]

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[52] Joseph H. Beale in 4 IOWA L. BULLETIN 3, 8, citing Jenness *v.* Jenness, 24 Ind. 355 (1865); Johnson *v.* Johnson, 12 Bush (Ky.) 485 (1877); Tipton *v.* Tipton, 87 Ky. 243, 8 S. W. 440 (1888); Pate *v.* Pate, 6 Mo. App. 49 (1874); Hopkins *v.* Hopkins, 35 N. H. 474; (1857) Schonwald *v.* Schonwald, 2 Jones Eq. (N. C.) 367 (1856); Dutcher *v.* Dutcher, 39 Wis. 651 (1876); Long *v.* Long, 18 Victorian L. R. 792 (1892).

[53] Williams *v.* Dormer, 2 Rob. Ecc. 505 (1852); Chichester *v.* Donegal, 1 Add. Ecc. 5, 19 (1822).

[54] The following from 11 HALSBURY'S LAWS OF ENGLAND, 507, note, seems to explain this further. "The Consistory Court of London from the time of Queen Elizabeth down to January, 1858, . . . was the only ecclesiastical court of first instance in England which was accustomed to entertain matrimonial and divorce suits from all parts of England. The origin of this jurisdiction was as follows: Prior to the reign of Henry VIII, a person might cite to appear in the ecclesiastical court of his own diocese a party residing in another diocese. By STAT. (1531), 23 HEN. VIII, c. 9, parties were not to cite a defendant to appear in a court out of his diocese. The common law courts, however, held that this statute was intended to be merely for the benefit of the subject, and that if both parties to a suit were willing to have it tried in a court in a diocese in which one of them did not reside, they might do so. Suitors . . . in heavy and important causes preferred to have their case tried in the Consistory Court of London. . . . In these cases the practice was for the petitioner in the suit to take up a residence for twenty-one day's in the diocese of London, and then to apply to the Consistory Court to issue a citation to the proposed defendant in the suit. . . . If the defendant entered an appearance objecting under the Statute of Henry VIII to the jurisdiction of the court the suit was dropped; but if the defendant entered an appearance to the citation or took no notice of it, it was assumed that the party waived the objection to the jurisdiction, and the suit proceeded and was heard and decided in the London court in due course."

[55] Bonaparte *v.* Bonaparte, [1892] P. 402; Bater *v.* Bater, [1906] P. 209.

[56] Johnson *v.* Cooke, [1898] 2 I. R. 130, commented upon in 13 HARV. L. REV. 604

If the English law would recognize the validity of foreign decrees of nullity of marriage, pronounced under the conditions under which an English court would take jurisdiction, some general doctrine of the requisites for a nullity suit might be said to be established. But in the important case of *Ogden* v. *Ogden*[57] the Court of Appeals held that a decree of a French court annulling a marriage in England between a Frenchman and an Englishwoman was not entitled to recognition in England, and the woman's second marriage, entered into after the French decree, was rendered bigamous. But here the French court had as much basis for jurisdiction as did the court in *Bater* v. *Bater*, or the Irish court in *Johnson* v. *Cook*. In *Simonin* v. *Mallac*[58] a previous French decree of nullity was likewise disregarded. The citations in cases and texts go back to Sir William Scott's judgment in the case of *Sinclair* v. *Sinclair* in 1798.[59] To a suit by a wife the husband set up a decree of nullity of marriage, pronounced in Brussels on proceedings instituted by him. The marriage had taken place in Paris. Said the court:

"A sentence of nullity of marriage . . . in the country where it was solemnized would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country, on the validity of a marriage not within its territories, nor had between subjects of that country, would be universally binding."

This seems entirely right — but it does not say, as Sir Gorrell Barnes in *Ogden* v. *Ogden* seems to cite it to say, that a foreign nullity is of no effect in England. The learned judge intimates that if a decree of nullity on the ground of impotence were given in either the court of the domicile, or where the marriage was celebrated, it might be treated as universally binding. Why a decree on this ground is to be given special recognition is not explained. At any rate, the doctrine in the cases stated, that the decree of nullity of a foreign court is not conclusive in England is recognized to be the existing law.[60] The resulting situation is certainly an unfortunate one, but is not the only instance of the English law's refusing to recognize rights given under foreign law which it gives under similar conditions by its own.

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[57] [1908] P. 46, 78 *et seq.*

[58] 2 Sw. & Tr. 67 (1860).

[59] 1 Hagg. Cons. 294, 297 (1798).

[60] 6 HALSBURY'S LAWS OF ENGLAND, 271; FOOTE'S PRIVATE INT. JURISPRUDENCE, 4 ed., 114; WESTLAKE, *supra*, 98.

Only a few American cases have raised the question of jurisdiction for annulment of a marriage, and they cannot be said, in spite of pretty flat statements of a rule in the texts, to establish any definite trend of authority. New York started out with a statement to the effect that

". . . the lex loci which is to govern married persons and by which the contract is to be annulled, is not the law of the place where the contract was made, but where it exists for the time, where the parties have their domicil . . ."[61]

a perfectly true statement as regards divorce, which the court was talking about, and which the reference to Story sustains. In a later case[62] New York citizens went into Canada and went through a marriage ceremony. The girl was under age and subsequently the marriage was declared a nullity by the New York court. The point emphasized was that the parties were residents of New York. While the distinction between annulment and divorce was not made, and divorce cases were cited and relied on, yet the result is not improper. New York law has the final word in saying whether a marriage status was created between New York people. A later case on similar facts was decided by the Court of Appeals the same way.[63] The policy of these cases may or may not be right. They do not fit the American doctrine that a marriage good where celebrated is good everywhere. But from a jurisdictional standpoint, if a state refuses to recognize a marriage status for its citizens when married outside the state in violation of its law, it has the power to do so. That is the only point here.

A Vermont case,[64] while relying on the statement found in Bishop, nevertheless presents the same facts, for the petitioner was a Vermonter when he married in Massachusetts. The New Jersey case of *Blumenthal* v. *Tannenholz*[65] denied the authority of a New Jersey court to annul a marriage which had taken place in New Jersey, which the complaining party alleged to have been

[61] Church, J., in Kinnier *v.* Kinnier, 45 N. Y. 535 (1871).

[62] Mitchell *v.* Mitchell, 63 Misc. 580, 117 N. Y. Supp. 671 (1909).

[63] Cunningham *v.* Cunningham, 206 N. Y. 341, 99 N. E. 845 (1912). The case is criticized in 26 HARV. L. REV. 253; Hall *v.* Hall, 67 Misc. 267, 122 N. Y. Supp. 401 (1910), was to the same effect, though it is to be noted that it does not appear therein where the parties were domiciled at the time of the marriage.

[64] Barney *v.* Cuness, 68 Vt. 51, 33 Atl. 897 (1895).

[65] 31 N. J. Eq. 194 (1879).

fraudulently made to understand a mere betrothal. The complainant was at the time of the marriage and suit a resident of Canada; the defendant's residence was not shown. The court relied on Bishop's requirement of domicile. It is hard to say anything about the case further than respectfully to dissent from its conclusions. If New Jersey could not say that these parties had never gone through a marriage ceremony, no state could. The strongest case against the position taken in this discussion is another New Jersey decision, *Avakian* v. *Avakian*.[66] It was held that the New Jersey court had jurisdiction to annul a marriage contracted in England between a resident of Massachusetts and an Armenian, who at the time was on her way to New Jersey to take up her residence. Here was neither marriage in New Jersey, nor a party there domiciled at the time of the marriage. If the parties were in fact married at all, and the court assumes they were, there would not be a domicile in New Jersey at the time of the suit. Pitney, V. C., who delivered the opinion of the court, is not sure that domicile was necessary, since the defendant was present in court. This case would not support Bishop, either, and would seem to require only presence of the plaintiff and personal service on the defendant. It would have been a hard case on its facts to have decided against the petitioner.

If any case could show the undesirable results of Bishop's rule it is the Illinois court's decision in *Roth* v. *Roth*.[67] Roth, a subject of Würtemberg, came to Illinois, acquired a domicile, and there made his fortune. He was married, while in Illinois, to a woman who was also domiciled there. Later Roth went back to Würtemberg, where he secured a decree of nullity of the marriage because he, as a subject of Würtemberg, had married outside the country without the sovereign's consent. The Illinois court, while stating that the marriage was valid and binding there (as of course it very clearly was), held that the first wife was not entitled to a widow's share in Roth's Illinois property. Mulkey, J., said:

"It was therefore, according to the general current of authority on the subject, entirely competent for the courts of that kingdom having jurisdiction of such matters to give effect to that law by annulling and setting aside the marriage. . . "[68]

[66] 69 N. J. Eq. 89, 60 Atl. 521 (1905).

[67] 104 Ill. 35 (1882).

[68] *Ibid.*, 50.

The dissenting opinion of Walker, J., is worth quoting from:

"Had any court having competent jurisdiction granted a divorce, then by abrogating the marriage contract she would have lost her rights to dower and heirship, because the contract was destroyed in all of its parts, and the parties absolved from its performance, and all rights under it destroyed and ended. But in this case there was no divorce, but it was decreed, in the teeth of our never doubted laws, to have been void."[69]

South Dakota, in a case already mentioned,[70] has clearly said it will not decree nullity of a California marriage, even though by the laws of the new domicile it would be invalid. Massachusetts has properly refused to recognize a nullity decree of a New York court, where the husband was domiciled, when the marriage took place in Massachusetts between parties at the time domiciled there.[71] While this decision does not decide on its facts where jurisdiction was to give a valid nullity decree, it opposes Bishop's statement that domicile is the foundation.

Finally, in *Levy* v. *Downing*[72] the Massachusetts court refused to annul a marriage entered into by Massachusetts parties in New Hampshire. No Massachusetts statute declared the marriage void, though a New Hampshire statute said it was voidable. The court said that the marriage would stand until avoided in New Hampshire. The case comes to a different result from that reached in the New York cases cited,[73] but is not necessarily opposed on principle. Here was no declared policy of Massachusetts which would refuse to create a marriage status for its citizens upon a marriage good until the state where it took place declared it avoided. In New York there was, or the court thought there was. The Massachusetts result is desirable, but since both the *lex loci contractus* and the *lex domicilii* are concerned in creation of the marriage state of these people, either could, by annulment, avoid the marriage.

A recent Wisconsin case can hardly be sustained on this theory set forth above. The parties, who resided in Wisconsin, were married in Minnesota. One of them was an epileptic, and the marriage, by the Minnesota statute, was voidable, but valid until

[69] Bishop of course approves this case. See vol. 2, 35, note, of his MARRIAGE, DIVORCE AND SEPARATION.

[70] Garcia *v.* Garcia, 25 S. D. 645, 127 N. W. 586 (1910).

[71] Cummington *v.* Belchertown, 149 Mass. 223, 21 N. E. 435 (1899).

[72] 213 Mass. 334, 100 N. E. 638 (1913).

[73] See *supra*, note 50.

avoided. In a suit for declaration of the validity of the marriage in Wisconsin a decree of nullity was pronounced.[74] It would seem that if this marriage was not contrary to Wisconsin law, the parties would be man and wife until Minnesota, the only state whose law was transgressed, set it aside. The Wisconsin court should have insisted, as did that of Massachusetts, that the parties go back to the state of the marriage if it was to be declared a nullity.

Statutory provisions regarding annulment and their interpretation by courts do not furnish much light as to the principle behind them. Early American statutes often used the term "divorce" as including both divorce and annulment, though the dissolution from legally existing bonds of matrimony was provided for at an early date.[75] Some of our states have no statutory provisions for annulment at all. Colorado makes a cause for divorce what would generally be treated as a basis for a nullity decree, but does not provide for annulment as such.[76] Without statute it has been recognized that there is general jurisdiction in a court of equity to decree null and void a marriage where the cause alleged is one of the well-known grounds on which equity gives relief in cases of contract.[77] The frequent situation is that certain causes for annulment are specified in a general chapter on "Divorce" or "Marriage and Divorce."[78] Whether or not a one-year residence requirement laid down for divorce suits is applicable to a nullity suit is the subject of a difference of judicial opinion.[79] Answering the question may be, as it was in the Minnesota case, a matter of statutory construction, rather than one concerning the nature of annulment. While domicile is enough to found jurisdiction for divorce, statutes generally require a person to be domiciled for a definite period before he can sue for a divorce. And when annulment is treated in the same connection, it may well be that such residence is required for this action too. On the ground that the

[74] Kitzman *v.* Kitzman, 166 N. W. 789 (Wis. 1918.)

[75] See 3 HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS, 5 *et seq.*

[76] See MILLS, ANNOTATED STAT. 1912, c. 46, 977.

[77] 26 CYC. 908, and cases cited.

[78] COMP. L. OF OKLAHOMA, 1909, c. 87; 1 BIRDSEYE, COMP. L. OF N. Y., 1016; KENTUCKY STATS. 1915, § 260 *et seq.*; KANSAS GEN. STAT. 1915, § 7585.

[79] That the statute does apply: Eliot *v.* Eliot, 77 Wis. 634, 46 N. W. 806 (1890); Wilson *v.* Wilson, 95 Minn. 464, 104 N. W. 300 (1905). *Contra*, Montague *v.* Montague, 25 S. D. 471, 127 N. W. 639 (1910), ANN. CAS. 1912 C. 591, and note collecting authorities.

legislatures had always treated the two together, the Washington court has held that a statute providing for service by publication in divorce actions applies to nullity suits.[80] Statutes of some states make requirements of annulment and divorce suits the same for both jurisdiction and procedure.[81]

In 1907 an act Regulating Divorce and Annulment of Marriage was approved by the Conference of Commissioners on Uniform State Laws and recommended for adoption. The first section of the act states the grounds for annulment. Section six provided for the court which is to hear the suits. Section seven says:

"For purposes of annulment of marriage, jurisdiction may be acquired by personal service upon the defendant within this state when either party is a *bonâ fide* resident of this state at the time of the commencement of the action."

Section nine provides that where the plaintiff is a *bonâ fide* resident of the state and the defendant cannot be served within the jurisdiction, there may be service by publication, followed where practicable by personal notice to the defendant. The draftsmen of this act were not troubled about the right of any other state than the one which created the marriage to annul it. But the difficulty is still present, is it not? If South Dakota annulled, because its table of degrees of consanguinity forbade a marriage contracted in California, where valid, would California or any other state [82] recognize the effect of this decree? If all the states would adopt the act, the matter would be conclusively settled, for section twenty-two provides that full faith and credit shall be given to a decree of annulment or divorce of another state when given in conformity with the jurisdictional requirements of the uniform statute. Recognition of another's annulment decree, no matter where the marriage was created would be compelled by the municipal law of each state. But even with the great effort which has been made, there are still states which have not even yet adopted the Negotiable Instruments Law, the best known and most

[80] Piper *v.* Piper, 46 Wash. 671, 91 Pac. 189 (1907); *contra*, Bisby *v.* Mould, 138 Iowa, 15, 115 N. W. 489 (1908).

[81] IOWA CODE, § 3183, and CODE SUPP. § 3187 *a*; NEBRASKA COMP. STATS. 1903, § 3167; VIRGINIA CODE, 1904, § 2259.

[82] The act leaves to each state to establish its own table of degrees for consanguinity or affinity.

thoroughly discussed of all the uniform acts. It will be a long time before all legislatures get around to the Annulment and Divorce Act.

Providing for annulment jurisdiction where the complaining party lives has great advantages over compelling him to go to the place where the marriage was created. It is expedient, convenient, certain. Why would not the best way be to drop the doctrine of nullity, with its relation back and bastardizing of innocent children and otherwise ignoring the existence of a fact, and include the common causes of annulment under divorce? The state where the party lives can then say that the marriage is at an end. While the law requiring recognition of such a decree is unfortunately somewhat tangled, it probably is not as bad at its worst as what we may expect in the recognition of nullity decrees.

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